Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1189

CAPTAIN LEWIS T. MOORE,

Petitioner,

—v.—

JAMES R. SCHLESINGER,
Secretary of Defense, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

CAPTAIN LEWIS T. MOORE,

Petitioner,

v.

JAMES R. SCHLESINGER,
Secretary of Defense, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petitioner, Captain Lewis T. Moore, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on November 21, 1975. The Court of Appeals affirmed the judgment of the United States District Court for the

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District of Colorado entered on October 29, 1974, dismissing the case for lack of jurisdiction.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, which is unreported, is set out in the Appendix, infra, p. 1a. The opinion of the District Court, which is unreported, is set out in the Appendix, infra, p. 9a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Where a verified complaint alleges that a military person's tour of duty as an instructor at the Air Force Academy was improperly terminated and a punitive transfer to other duty imposed, all as a result of the writing of letters to Congress critical of practices at the Academy, was it proper to dismiss the complaint for lack of jurisdiction, on the following grounds:

1. That "only when military actions are so restrictive of a soldier's fundamental rights as to deny them altogether and thus constitute an abuse of the broad

discretion granted to military officers in their command, will the Court be said to have jurisdiction to review the merits of such a dispute?"

2. That the requisite jurisdictional amount under 28 U.S.C. §1331 was absent, even though petitioner had not been afforded an opportunity to prove the amount in controversy requirement?

3. That the complaint did not state a cause of action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388?

STATUTORY PROVISIONS INVOLVED

10 U.S.C. §1034:

"Communicating with a member of Congress. No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

STATEMENT OF THE CASE 1/

Petitioner is a graduate of the Air

1/ The Statement of the case is taken

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Force Academy and a regular commissioned officer in the United States Air Force. In 1970 he was assigned to a four-year tour, through June of 1974, to the faculty of the United States Air Force Academy as an instructor. During the first three years of his teaching he received a consistently high rating as "outstanding." On February 20, 1973, petitioner wrote various members of Congress about Academy policies and practices concerning faculty tenure, the honor system, handling of cadet morale and drug problems, the high cadet attrition rate, and problems of internal and external credibility.

As a result of these letters, investigations of the Academy were launched almost immediately by the General Accounting Office and the high command of the Air Force. On March 13, 1973, Moore was assured by the head of his department that there would be no retaliation. Nevertheless, as a result of the letters and within a few days after the Accounting Office investigation was started, his four-year tour of teaching was curtailed and, while teaching a class, he was given a notice of termination on March 23, 1973. The complaint alleges that his removal from the classroom was in retaliation for having written the letters, a device to

---

from petitioners' complaint whose allegations are taken as true on a motion to dismiss.

restrict his right to communicate with members of Congress, and intended to force his resignation. Petitioner claimed that the basis for his removal stated in the letter of termination--"inability to instill career-service motivation in cadets"--was totally spurious and that the respondents Academy staff members, motivated by a desire to stop him from communicating with members of Congress and to interfere with his rights of free speech and association, conspired to intimidate petitioner and thus prevent him from continuing to hold his office as an instructor at the Air Force Academy.

He alleged also that in furtherance of this pattern of intimidation and conspiracy, the respondents knowingly and in conference with each other engaged in a pattern of retaliatory and intimidating conduct toward the petitioner, including an invitation to him to resign; an order to see the staff psychiatrist; restriction from any contact with cadets; subjection to a series of orders severely limiting his freedom of movement and activity and his right to attend classes at Denver University; and further orders to move out of his faculty office and to remove his personal books and effects.

On May 10, 1973, Moore initiated a complaint under Article 138, Uniform Code of Military Justice, complaining of all of the foregoing violations of his rights. The request for redress was denied the following month. Petitioner was assigned

temporarily to Ent Air Force Base, Colorado, on May 2, 1973 as a weather officer. On June 27, 1973, petitioner was notified in writing that he was due for permanent reassignment during the month of July 1973. On July 3, 1973, petitioner filed this action seeking to restrain his permanent transfer, to secure reinstatement to the Air Force Academy faculty, and for money damages. The application to restrain the transfer was denied.

Discovery was thereafter undertaken. Respondents filed a Motion for Summary Judgment on May 31, 1974. The case was subsequently transferred to Honorable Richard P. Matsch, who treated the motion for summary judgment as a motion to dismiss (App., infra, p. 12a) and entered an Order of Dismissal on October 29, 1974 for lack of jurisdiction. Petitioner appealed.

While appeal was pending, petitioner received an overseas assignment. On May 15, 1975, petitioner voluntarily submitted his resignation from all appointments in the Air Force to be effective September 1, 1975, and separation orders were issued on that day. The Court of Appeals heard oral argument on the day after petitioner's resignation became effective. The Circuit Court affirmed the Order of Dismissal of the trial Court on November 21, 1975.

The Court of Appeals, affirmed on the following grounds (even though there was

no evidentiary record in the case) (App., infra, pp. 6a-8a):

1. "Only when military actions are so restrictive of a soldier's fundamental rights as to deny them altogether and thus constitute an abuse of the broad discretion granted to military officers in their command will the court be said to have jurisdiction to review the merits of such a dispute."

2. That the amount in controversy requirement of 28 U.S.C. Sec. 1331, though alleged, was not satisfied.

3. That Bivens v. Six Unknown Named Agents, 403 U.S. 388, "has been narrowly read and itself recognizes the immunity of officials who are performing discretionary acts. . ."

REASONS FOR GRANTING THE WRIT

1. In declining to exercise jurisdiction in this case, the Tenth Circuit ignored the fundamental doctrine which has been enunciated by this Court at least since Bell v. Hood, 327 U.S. 678 (1946), that "the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy." Id. at 682. In deciding the case the way it did, the Tenth Circuit simply ignored the equally elementary doctrine of Bell v. Hood that "whether the complaint

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states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy." Ibid.

It is clear from the opinion of the Court of Appeals that in dismissing the complaint for lack of jurisdiction, it was simply pre-judging the merits, as a matter of both law and fact.

Even in its own terms, the Tenth Circuit's opinion is fatally wrong, for it is not the rule that "only when military actions are so restrictive of a soldier's fundamental rights as to deny them altogether . . . will the court be said to have jurisdiction to review the merits of such a dispute" (App., infra, p. 6a). Cf. Parker v. Levy, 417 U.S. 733 (1974); Carlson v. Schlesinger, 511 F. 2d 1327 (D.C. Cir. 1975). For whether rights are denied "altogether" requires a factual determination on the merits, if only based on the allegations of the complaint. But by declining to exercise jurisdiction, the Tenth Circuit clearly has ignored the merits.

The disposition of the case by the Tenth Circuit demonstrates such an elementary misunderstanding of the difference between the exercise of jurisdiction and review on the merits, that the decision below should be summarily reversed with a per

curiam opinion directing the Court of Appeals' attention to Bell v. Hood, supra.

2. The Tenth Circuit supported dismissal of petitioner's complaint on the further ground that, with respect to the money damage claims against the individual defendants, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) "has been narrowly read and itself recognizes the immunity of officials who are performing discretionary acts exercising discretionary authority." App., infra, p. 7a-8a. 2/ This holding is so clearly erroneous, it alone supports summary reversal on this petition. First, Bivens has not been "narrowly read." See cases collected in Emerson, Humber & Dorsen's Political and Civil Rights in the United States (Fourth Edition), pp. 1315-1316. Second, the question of immunity must follow not precede trial. Scheuer v. Rhodes, 416 U.S. 232 (1974).

The fact that 10 U.S.C. §1034 provides no specific sanctions, either civil or criminal, does not foreclose the availability of a remedy, for as Mr. Justice Brennan points out in Bivens, (403 U.S. at 396):

> Of course, the Fourth Amendment does not in so many words

2/ The district court held explicitly that Bivens was "limited to Fourth Amendment rights." App., infra, p.

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> provide for its enforcement by an award of money damages for the consequences of its violation. But "It is . . . well settled that where rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. at 684.

3. The third fundamental error committed below was to decline to exercise jurisdiction on the ground that petitioner failed to meet the jurisdictional amount requirement of 28 U.S.C. Sec. 1331. It is basic doctrine that it must appear to a legal certainty that a claim is worth less than $10,000 before a court may dismiss on that ground. St. Paul Mercury Co. v. Red Cab Company, 303 U.S. 283 (1938). There was no such certainty here, for petitioner had alleged his unlawful removal from his faculty post, removal from his family, interruption of his work toward an advanced degree and damage to his professional reputation. Surely, in the face of those claims, no court could reasonably hold prior to trial that petitioners' damages could, to a legal certainty, be said to fall short of $10,000. Cf. Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1976

APPENDICES

OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

FILED

Nov 21 1975

Howard K. Phillips
Clerk, United States
Court of Appeals
Tenth Circuit

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1882

CAPTAIN LEWIS T. MOORE, Appellant, v. JAMES R. SCHLESINGER, Secretary of Defense; DR. JOHN L. McLUCAS, Acting Secretary of the Air Force, GENERAL JOHN D. RYAN, Air Force Chief of Staff; LT. GENERAL A. P. CLARK, Superintendent of the Air Force Adademy;	Appeal From The United States District Court For The District of Colorado (D.C. #Civ.5152)

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BRIG. GENERAL WILLIAM T. WOODYARD, Dean of Faculty, U.S.A.F. Academy; COL. ROBERT G. TAYLOR, Professor and Head of Department of Geography, U.S.A.F. Academy; LT. COL. HARRY W. EMRICK, Associate Professor of Geography, U.S.A.F. Academy,

Appellees.

William F. Reynard, American Civil Liberties Union Foundation of Colorado, Inc., Denver, Colorado (Robert Tabor Booms, Denver, Colorado, with him on the Brief), for Appellant.

Captain Bruce Clark, U.S.A.F., Litigation Division, Office of the Judge Advocate General, Washington, D.C. (James L. Treece, United States Attorney, and Gary M. Jackson, Assistant United States Attorney, with him on the Brief), for Appellees.

Before LEWIS, Chief Judge, SETH and McWILLIAMS, Circuit Judges.

PER CURIAM.

At the time this litigation was initiated, appellant was a Captain in the United States

Air Force. He had been a commissioned officer in the regular Air Force since 1966, when he was graduated from the Air Force Academy. In 1970, he was assigned for a four-year tour of duty to the faculty of the Academy in the Department of Geography. Of the ten Officer Effectiveness Reports accomplished on appellant since his initial duty assignment in 1966, five had rated him as "exceptionally fine" and fine as "outstanding." In February 1973, appellant wrote various members of Congress expressing his views on policies at the Academy. On March 13, 1973, appellant was advised by his supervising officer appellee, Colonel Robert G. Taylor, that the Academy administration was aware of those letters but that no adverse action would be taken as a result of them.

On March 23, 1973, more than a year prior to the expiration of his tour to the faculty, appellant was called out of his classroom and was relieved of duty as an instructor by appellees Taylor and Lieutenant Colonel Harry W. Emrick. The reason given later was lack of motivation to pursue an Air Force wide career, which lack led to an inability to motivate the cadets in his classes. Appellee Taylor ordered appellant to see the Staff Psychiatrist at the Academy, and ordered appellant to have no further contact with the cadet wing. In April, 1973, appellant was temporarily detailed to Ent Air Force Base, and in June he was permanently reassigned to Offutt Air Force Base, Nebrasks. Some time earlier, appellant had initiated a complaint under Article 138 of the Uniform Code

of Military Justice, requesting redress of grievances relating to matters here in controversy. The request was denied by appellant's commanding officer, appellee Taylor, and later by the officer exercising general court-martial jurisdiction over Taylor, appellee Clark. The action was subsequently reviewed and approved by the authorized designee of the Secretary of the Air Force.

At about that same time, appellant filed this action seeking a declaratory judgment, injunctive relief, relief in the form of mandamus, and a writ of habeas corpus to reverse his reassignment to Offutt and order his reinstatement as an instructor at the Academy. He further sought damages for violation of his constitutional right to freedom of expression. The United States District Court for the District of Colorado denied appellant's motion for preliminary injunctive relief and later ordered the case dismissed for lack of jurisdiction over the subject matter. Thereafter, and while this appeal was pending, appellant received an overseas assignment. On May 15, 1975, appellant voluntarily submitted his resignation from all appointments in the Air Force to be effective September 1, 1975. This resignation was submitted the last day of an extension granted appellant by the Air Force to decide whether he wished to accept that overseas assignment. The office of the Secretary of the Air Force accepted appellant's resignation, and he was ordered discharged. Separation orders were issued effective September 1, 1975.

Oral argument in this case was heard by this court on the day after appellant's resignation became effective. The resignation by appellant is such a change of status as to significantly alter the remedies available to him and these proceedings. Since appellant is no longer a member of the Air Force, the courts cannot grant him the interservice remedies he requested in his complaint. Appellant cannot be reassigned to the Academy as an instructor, no mandamus or habeas corpus relief is appropriate, and a declaratory judgment would no longer affect the rights of the litigants. The situation is not capable of repetition, nor is it evading review by its nature. Instead appellant by his own action caused the issue here to become moot. The First Amendment challenge to the military's power to reassign raised by appellant in this action is no longer a controversy capable of resolution by this court in the form of interservice remedies, and as to these remedies the case is rendered moot. See DeFunis v. Odegaard, 416 U.S. 312.

The only remedy that could survive appellant's resignation is his damage claim for violation of his constitutional right. Appellant alleges his termination as an instructor and subsequent transfer from the Academy were punitive, retaliatory measures taken in response to his exercise of his First Amendment privilege in writing to Congress. It has been recognized that ". . . citizens in uniform may not be stripped of basic rights simply because

they have doffed their civilian clothes," as stated by former Chief Justice Earl Warren and quoted by this court in Kennedy v. Commandant, U.S. Disciplinary Barracks, 377 F.2d 339 (10th Cir.). Another court has held that persons do not lose their First Amendment rights by joining the armed forces. Cortright v. Resor, 447 F.2d 245 (2d Cir.). Rather, that court asserted that ". . . right . . . should be preserved to the maximum extent possible, consistent with good order and discipline and national security . . . [and] the effectiveness of the unit." When a soldier's fundamental rights are involved, the test becomes one of balancing military demands against individual freedoms. Carlson v. Schlesinger, 364 F.Supp. 626 (D.C.). Only when military actions are so restrictive of a soldier's fundamental rights as to deny them altogether and thus constitute an abuse of the broad discretion granted to military officers in their command will the court be said to have jurisdiction to review the merits of such a dispute.

In this case, the recognition of appellant's constitutional right must be weighed against the traditional policy of judicial noninterference in military duty assignments. Oroloff v. Willoughby, 345 U.S. 83; Noyd v. McNamara, 378 F.2d 538 (10th Cir.). The record indicates the allegations are not sufficient to allow this court to interfere with the authorized exercise of discretion by Air Force officials and entertain jurisdiction over the dispute. The lower court in its dismissal order states that ". . . assuming the truth of all

the factual allegations made by Captain Moore, there is no adequate showing of such an abuse of discretion as to warrant interference by a civilian court." This demonstrates the analysis made by the trial court was correct under the authorities. It shows that no abuse of discretion is asserted in the facts alleged, sufficient to establish jurisdiction. The threat to First Amendment freedom, as appellant presents it here, does not justify judicial interference in a matter involving military discretion.

Even if the court had found sufficient grounds to justify intervention, there are other defects in the jurisdiction asserted by appellant. Jurisdiction is not established under section 1985 of the Civil Rights Act, as that section is inapplicable by its own terms. Nor can appellant establish jurisdiction under 28 U.S.C. § 1331, the general federal question category. To maintain his action under this section, appellant must satisfy the amount in controversy requirement. Lynch v. Household Finance Corp., 405 U.S. 538. His transfer from duty at the Academy did not affect his rank or salary. Further, there is a general prohibition against suing federal officers who are acting within the scope of their authority. Bethea v. Reid, 445 F.2d 1163 (3d Cir.). Although in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, the United States Supreme Court allowed Bivens' claims against federal agents for violation of his Fourth Amendment rights, that case has been narrowly read and itself recognizes the immunity

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of officials who are performing discretionary acts exercising discretionary authority. Appellant has failed to establish jurisdiction of his claim.

It is unclear just what jurisdictional basis appellant claims in asking for judicial review of the Article 138 proceeding conducted in his behalf. The court has no power to review administrative rulings by courts-martial and military commissions as is clear from the section 701(b)(1)(F) exemption to the Administrative Procedures Act. Cortright v. Resor, 447 F.2d 245 (2d Cir.). The trial court correctly treated the motion of appellees for summary judgment as one to dismiss. Thompson v. United States, 291 F.2d 67 (10th Cir.).

Mootness as to certain requested measures of relief, a long-standing policy of judicial noninterference in military matters requiring discretion, and otherwise defective jurisdictional allegations all require the court to hold that no cause of action is alleged, and no adequate allegations of jurisdiction has been made.

AFFIRMED.

OPINION OF THE UNITED STATES DISTRICT

FILED
United States District Court
Denver, Colorado

OCT 29 1974

JAMES R. MANSPEAKER
By _____ Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-5152

CAPTAIN LEWIS T. MOORE,
510-46-9657FR

Plaintiff,

v.

JAMES R. SCHLESINGER, Secretary of Defense; DR. JOHN L. McLUCAS, Acting Secretary of the Air Force; GENERAL JOHN D. RYAN, Air Force Chief of Staff; LT. GENERAL A. P. CLARK, Superintendent of the Air Force Academy; BRIG. GENERAL WILLIAM T. WOODYARD, Dean of Faculty, U.S.A.F. Academy; COL.

ROBERT G. TAYLOR, Professor and Head of Department of Geography, U.S.A.F. Academy; LT. COL. HARRY W. EMRICK, Associate Professor of Geography, U.S.A.F. Academy,

Defendants.

William F. Reynard of Reynard, Dorward & Booms, P.C., 719 University Building, Denver, Colorado, 80202, for plaintiffs; James L. Treece, United States Attorney, 323 United States Courthouse, Denver, Colorado 80202 and Bruce E. Clark, Captain, USAF, Office of The Judge Advocate General, Washington, D.C. 20314, for defendants.

MEMORANDUM AND ORDER

MATSCH, Judge

The following is a statement of uncontroverted facts from a pre-trial order entered herein on March 15, 1974:

> "The Plaintiff is a Captain in the United States Air Force and is presently assigned at Offutt Air Force Base, Nebraska. Plaintiff has been a commissioned officer in the regular Air Force since 1966. In 1970 he was assigned for a tour to the faculty of the Air Force

Academy in the Department of Geography. Of the ten Officer Effectiveness Reports accomplished on plaintiff since his initial duty assignment in 1966, five have rated him as "exceptionally fine" and five as "outstanding." In February 1973, Plaintiff wrote various members of Congress. On March 13, 1973, Plaintiff was advised by the defendant Taylor that the administration of the Academy was aware of the letters to Congress but that no adverse action would be taken as a result of them. The Plaintiff was removed from his position as an instructor on 23 March 1973 by Colonel Robert G. Taylor and Lt. Colonel Harry W. Emrick. On 27 March 1973 defendant Taylor ordered Plaintiff to see the Staff Psychiatrist at the Air Force Academy. On 29 March 1973, defendant Taylor ordered the Plaintiff not to have contact with the cadets. On 10 April 1973 the plaintiff was ordered by the defendant Emrick not to perform duties as a timer in Academy track meets. The Plaintiff initiated a complaint under Article 138, Uniform Code of Military Justice, requesting redress of grievances relating to matters here in controversy. In June, 1973, the request for redress was denied by the Plaintiff's commander, the defendant Taylor, and later by the officer exercising general court-martial jurisdiction over Taylor, the defendant Lt. General A. P. Clark,

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> The action was subsequently reviewed and approved by the authorized designee of the Secretary of the Air Force."

The judge presiding at that pre-trial conference granted the defendants an opportunity to file a motion for a summary judgment "directed to the jurisdictional aspects of the case" and within the time set by that order the defendants did file such a motion seeking a summary judgment for defendants for a lack of jurisdiction. That motion is now before the Court and it is to be considered as a motion to dismiss for a lack of jurisdiction over the subject matter of the plaintiff's claims for relief.

By this complaint, the plaintiff requests relief by way of a declaratory judgment that his removal from a teaching assignment at the Offutt Air Force Base were wrongful and were violative of his constitutional rights; that he is entitled to money damages; that he is entitled to injunctive relief by mandamus and he has petitioned for a writ of habeas corpus. Additionally he seeks judicial review of the denial of relief on his complaint under Article 138, Uniform Code of Military Justice.

The essential allegations that the administrative actions taken by the defendants, who are or were officers superior to the plaintiff in the chain of command, were in retaliation for the plaintiff's exercise of First Amendment rights and constituted an intimidation and a conspiracy to restrict and limit those rights.

The plaintiff urges jurisdiction of his claim for damages in 28 U.S.C. 1331. While defendants contend that there can be no showing of damages exceeding $10,000.00, it is assumed that the jurisdictional amount is present in this case. The theory of damage liability is not a general tort theory but an alleged violation of 42 U.S.C. 1985(1), which provides, in pertinent part:

> "(1) If two or more persons in any state or territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof. . ."

the party injured or aggrieved may have an action for the recovery of damages occasioned thereby. The statute does not appear applicable by its own terms. Moreover, it has regularly been held that federal officers acting under color of federal law are immune from suit under this statute. Bethea v. Reid, 445 F.2d/ 1163 (3rd Cir. 1971), Williams v. Halperin, 360 F.Supp. 554 (S.D. N.Y. 1973).

It is argued, though, that there is a right to recover damages directly under the Constitution as recognized in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). In that case the Supreme Court majority did find a cause of action for damages caused by an un-

reasonable search and seizure. The interpretation of that opinion made by the Court of Appeals, Second Circuit in Bivens v. Six Unknown Agents, 456 F. 2d 1339 (1972) is informative here. Against the historical background and within the context of the other cases on immunity and discretion of federal officers discussed at length in that opinion, it must be concluded that the Bivens doctrine should be limited to Fourth Amendment rights and it is not applicable here.

In my view, there is no jurisdiction in this Court to grant relief in damages for the acts alleged in the plaintiff's complaint.

The remainder of the relief requested is to request interdiction of the military orders and cause a reassignment of the plaintiff to his former duty station. There is no jurisdiction to do so. This is not a proper petition for habeas corpus under 28 U.S.C. 2241 because the plaintiff does not seek release from the military service and it has been held that the writ is not appropriate for review of military duty assignments. Orloff v. Willoughby, 345 U.S. 83 (1953).

The plaintiff contends for mandamus, 28 U.S.C. 1361, to compel performance of a duty owed to him under the First Amendment and under 10 U.S.C. 1034 which provides as follows:

> "No person may restrict any member of an armed force in communicating with a

member of Congress, unless the communication if unlawful or violates a regulation necessary to the security of the United States."

In Cortright v. Resor, 447 F.2d 245 (2nd Cir. 1971), the court assumed jurisdiction under § 1361 to rescind a military transfer alleged to have been made in retaliation for the exercise of First Amendment rights; but the district court's order was reversed because the facts failed to show an abuse of the broad discretion granted to military officers in their commands. Assuming the truth of all of the factual allegations made by Captain Moore, there is no adequate showing of such an abuse of discretion as to warrant interference by a civilian court.

There is finally the question of a judicial review of the denial of relief in the Article 138 proceedings. It is urged that the procedure followed was inadequate and procedurally invalid. There is no statutory authority for a civilian court review of these administrative proceedings and they are expressly excluded from the Administrative Procedures Act, 5 U.S.C. 701(b)(F). To characterize the question as judicial review is to add nothing to the jurisdictional questions already discussed.

The plaintiff's request for convening a three-judge court under 28 U.S.C. 2282 was denied previously because nothing in the

complaint seeks to enjoin the operation on execution of any statute as unconstitutional.

Upon the foregoing, it is

ORDERED that the complaint and this cause of action are dismissed.

Done at Denver, Colorado, this 29th day of October, 1974.

BY THE COURT:

Richard P. Matsch, Judge
United States District Court

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1189

LEWIS T. MOORE, PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This is a suit for damages brought by a former Air Force officer against his former superior officers for allegedly violating his First Amendment rights by transferring him from his duty assignment.

In 1970, the Air Force assigned petitioner, then a Captain in the regular Air Force, to a tour of duty as an instructor at the Air Force Academy.[1] In February 1973, petitioner wrote letters to various members of Congress in which he criticized Academy policies and practices. On March 13, 1973, he was advised by his superior that the Academy was aware of the letters but that no adverse action would be taken against him as a result of the letters. Petitioner subsequently was removed from his position as an instructor and reassigned. He then requested

[1]This brief statement of the facts is taken from the opinions of the court of appeals (Pet. App. 2a-4a), and the district court (Pet. App. 10a-12a).

redress under Article 138, Uniform Code of Military Justice; his commanding officer denied the request. The Superintendent of the Academy and the authorized designee of the Secretary of the Air Force subsequently upheld the denial.

Petitioner then commenced this suit against his superior officers, alleging that their decision to transfer him was made in retaliation for his exercise of First Amendment rights. He sought money damages under 42 U.S.C. 1985 and also requested that his transfer be declared invalid and that he be reinstated to his former position.

On the government's motion, the district court dismissed the complaint. The court determined that the complaint failed to state a cause of action under 42 U.S.C. 1985, that there is no implied cause of action for money damages against government officials for violations of First Amendment rights, and that it had no jurisdiction to order reinstatement (Pet. App. 13a-15a).

While the case was pending in the court of appeals, petitioner resigned from the Air Force. The court of appeals thereupon determined that petitioner's requests for declaratory relief and reinstatement were moot (Pet. App. 5a). The court further determined that the district court had lacked jurisdiction over petitioner's claim for damages, and that the military transfer decision in any event represented an exercise of discretion that was not subject to review in the absence of more substantial allegations of abuse than petitioner had made in his complaint (Pet. App. 7a).

1. The court of appeals correctly determined that petitioner's claims for declaratory relief and reinstatement are moot. Since petitioner voluntarily resigned from the Air Force, he effectively waived whatever right he might otherwise have had to reinstatement, and declaratory relief would not now benefit petitioner.

2. The district court correctly determined that petitioner's complaint failed to state a cause of action for money damages. Petitioner apparently concedes that his complaint did not state a cause of action under 42 U.S.C. 1985; he asserts instead an implied right of action, relying upon *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (Pet. 9-10). There is no implied right of action for money damages for an alleged wrongful military transfer.

A military transfer decision is not judicially reviewable, absent a specific statutory provision for review. Cf. *Tennessee* v. *Dunlap,* No. 75-95, argued February 23, 1976. As this Court stated in *Orloff* v. *Willoughby,* 345 U.S. 83, 93-94 (emphasis supplied):

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. *While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.*

In any event, as the court of appeals correctly determined, military officers are not liable in money damages for a wrongful duty assignment.[2] The decision to assign a member of the military to a particular duty involves the exercise of broad discretion that should not be hindered by the threat of liability. The court of appeals was therefore correct in relying upon the "general prohibition against suing federal officers who are acting within the scope of their authority" (Pet. App. 7a). Since duty assignments are within respondents' duties and the actions involve the exercise of a discretionary function, respondents satisfy the traditional test for immunity under *Barr* v. *Matteo,* 360 U.S. 564, 571. The availability of immunity depends, of course, upon a judgment that "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens [resulting from immunity]." *Doe* v. *McMillan,* 412 U.S. 306, 320. In the context of the present case the "individual citizen" was a member of the Armed Forces, and the rights of such persons are "conditioned to meet certain overriding demands of discipline and duty." *Parker* v. *Levy,* 417 U.S. 733, 744. Cf. *Greer* v. *Spock,* No. 74-848, decided March 24, 1976. The chances of recurring harm to such individuals, therefore, are substantially outweighed by the necessity for the uninhibited exercise of discretion on the part of

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[2]Although petitioner accuses the court of appeals of declining to consider whether the complaint states a cause of action (Pet. 7-9), the court plainly considered and decided that question (Pet. App. 6a):

> [T]he allegations are not sufficient to allow this court to interfere with the authorized exercise of discretion by Air Force officials * * *.

military officers making duty assignments. Cf. *Orloff* v. *Willoughby, supra.* It follows that respondents were entitled to immunity in this case and that no cause of action for money damages should be implied. Cf. *Imbler* v. *Pachtman,* No. 74-5435, decided March 2, 1976.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[3]Petitioner also contends (Pet. 10) that the court of appeals incorrectly concluded that the $10,000 requirement of 28 U.S.C. 1331 had not been met. Since there was in any event no cause of action, this jurisdictional question is not determinative of petitioner's claim. But since petitioner's transfer did not affect his grade or salary (Pet. App. 7a), and his alleged First Amendment rights standing alone do not meet the jurisdictional requirement (*Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 547), it appears legally certain that petitioner's claim would not exceed $10,000. See *Goldsmith* v. *Sutherland,* 426 F.2d 1395 (C.A. 6), certiorari denied, 400 U.S. 960.